

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 97-0104 ST

Sales and Use Tax

For Tax Period: November, 1985 Through April, 1986

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Sales and Use Tax Retail Sales Merchant

Authority: IC 6-2.5-4-1; IC 6-2.5-9-3; Hall v. Indiana Dept. Of State Revenue, 660 N.E.2d 319 (Ind. 1995)

Taxpayer protests the imposition of sales tax on the sale of narcotics made as a retail merchant.

STATEMENT OF FACTS

On May 20, 1986, taxpayer was arrested for the possession of narcotics. At the time of his arrest, taxpayer had a large quantity of narcotics and approximately eight thousand dollars (\$8,000.00) in his possession. The Indianapolis Police Department seized a book of business transactions from the taxpayer. This book detailed sales made by the taxpayer from November, 1985 through April, 1986 for which sales tax was not remitted to the State of Indiana. Department agents reviewed the book and determined the taxpayer had made sales of one hundred sixty thousand seventy-five dollars (\$160,075.00) during the above-referenced period. A review of Department records resulted in the finding that the taxpayer had no retail merchant's certificate and no sales tax had been remitted by the taxpayer to the Department. On June 25, 1986 the Department made a jeopardy assessment against the taxpayer for unpaid sales and use tax in the amount of twenty-eight thousand nine hundred fourteen dollars and twenty-five cents (\$28,914.25) plus penalties, interest, and collection fees. Taxpayer protests this assessment. Additional facts will be provided below, as necessary.

I. Sales and Use Tax Retail Sales Merchant

DISCUSSION

The Department determined the taxpayer conducted his activities as a business. Business records, accounts receivable, sources of supply and customer listings were maintained. Taxpayer also engaged in collection efforts. At the time of his arrest, the taxpayer had possession of a large inventory and operating cash. It was determined by the auditor that standard operating procedures were maintained and taxpayer was involved in a retail business.

Indiana Code section 6-2.5-4-1 states:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration...

Indiana Code section 6-2.5-9-3 states:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state...

Pursuant to the above statutes, taxpayer was found personally liable for the sales taxes not paid to the Department on the sales made in his retail merchant status.

Taxpayer argues the sales tax assessment was based on his criminal conviction and, as such, is a double jeopardy prohibited by Hall v. Indiana Dept. Of State Revenue, 660 N.E.2d 319 (Ind. 1995). Hall, however, dealt with the controlled substance excise tax and the double jeopardy which attaches upon the assessment of the tax and a criminal prosecution based on the same incident of possession. Assuming Hall was applicable, the taxpayer's assessment of tax came before his criminal prosecution and, therefore, it is the criminal prosecution which would be found to be the second jeopardy.

FINDING

Taxpayer's protest is denied. Taxpayer has failed to prove he was not engaged in retail sales or,

alternatively, that he paid the sales taxes due on those sales.